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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

TOBY JONES, ) Case No. CV 18-06305-CAS (AS)  
Petitioner, ) **ORDER OF DISMISSAL**  
v. )  
JOSIE GASTELO, Warden, )  
Respondent. )  
\_\_\_\_\_)

BACKGROUND

On July 20, 2018, Toby Jones ("Petitioner"), a California state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). (Docket Entry No. 1). Petitioner challenges the September 3, 2014 decision of the California Board of Parole Hearings ("Parole Board") to deny Petitioner parole, following a 15-years-to-life sentence for a 1991 second degree murder conviction in the Riverside County Superior Court (Case No.

1 ICR11659).<sup>1</sup> The Petition solely alleges that the Parole Board  
2 erred when it failed to sua sponte deduct from the adjusted base  
3 term the pre-prison and post-conviction credits authorized by  
4 California Code of Regulations, Title 15, § 2411(a) and (b), and  
5 when it failed to set a parole release date as required by  
6 California Code of Regulations, Title 15, § 2411(c), in violation  
7 of Petitioner's right to due process under the California  
8 Constitution, Article I, § 7 and the 14th Amendment of the United  
9 States Constitution. (Petition at 5, 14-21).<sup>2</sup>

10  
11 On November 13, 2015, Petitioner filed a Petition for Writ  
12 of Habeas Corpus by a Person in State Custody pursuant to 28  
13 U.S.C. § 2254, challenging the same parole denial decision. See  
14 Toby Jones v. Josie Gastelo, Case No. EDCV 15-02350-CAS (AS);  
15 Docket Entry No. 1 ("prior habeas action"). On September 15,  
16 2015, the district court issued an Order and Judgment denying that  
17 habeas petition and dismissing the petition with prejudice, in  
18 accordance with the findings and conclusions of the Magistrate  
19 Judge. (Id.; Docket Entry Nos. 35-36). On the same date, the  
20 district court denied Petitioner a Certificate of Appealability.  
21 (Id.; Docket Entry No. 37).

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26 <sup>1</sup> The Court takes judicial notice of the pleadings in  
27 Toby Jones v. Josie Gastelo, Case No. EDCV 15-02350-CAS (AS).

28 <sup>2</sup> The Court cites to the Court's electronic docket.

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(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in §2255.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

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1 (C) The court of appeals may authorize the filing  
2 of a second or successive application only if it  
3 determines that the application makes a prima facie  
4 showing that the application satisfies the requirements  
5 of this subsection.

6 (D) The court of appeals shall grant or deny the  
7 authorization to file a second or successive application  
8 not later than 30 days after the filing of the motion.

9 (E) The grant or denial of an authorization by a  
10 court of appeals to file a second or successive  
11 application shall not be appealable and shall not be the  
12 subject of a Petition for Rehearing or for a Writ of  
13 Certiorari.

14 (4) A district court shall dismiss any claim  
15 presented in a second or successive application that the  
16 court of appeals has authorized to be filed unless the  
17 applicant shows that the claim satisfies the  
18 requirements of this section. 28 U.S.C. § 2244.

19 28 U.S.C. § 2244(b)(3) "creates a 'gatekeeping' mechanism for  
20 the consideration of second or successive applications in district  
21 court. The prospective applicant must file in the court of  
22 appeals a motion for leave to file a second or successive habeas  
23 application in the district court. § 2244(b)(3)(A)." Felker v.  
24 Turpin, 518 U.S. 651, 657 (1996).

25 The instant Petition and the prior habeas action both  
26 challenge Petitioner's custody pursuant to the same decision by  
27 the Parole Board. Accordingly, the instant Petition, filed on  
28 July 20, 2018, is a second or successive habeas petition for  
purposes of 28 U.S.C. § 2244. Therefore, Petitioner was required  
to obtain authorization from the Court of Appeals before filing  
the present Petition. See 28 U.S.C. §2244(b)(3)(A). No such  
authorization has been obtained in this case.

1       Moreover, the claim asserted in the instant Petition does not  
2 appear to fall within the exceptions to the bar on second or  
3 successive petitions because the asserted claim is not based on  
4 newly discovered facts or a "a new rule of constitutional law,  
5 made retroactive to cases on collateral review by the Supreme  
6 Court, that was previously unavailable." Tyler v. Cain, 533 U.S.  
7 656, 662 (2001). However, this determination must be made by the  
8 United States Court of Appeals upon a petitioner's motion for an  
9 order authorizing the district court to consider his second or  
10 successive petition. 28 U.S.C. § 2244(b); see also Burton v.  
11 Stewart, 549 U.S. 147, 157 (2007)(where the petitioner did not  
12 receive authorization from the Court of Appeals before filing  
13 second or successive petition, "the District Court was without  
14 jurisdiction to entertain [the petition]"); Barapind v. Reno, 225  
15 F.3d 1100, 1111 (9th Cir. 2000)("[T]he prior-appellate-review  
16 mechanism set forth in § 2244(b) requires the permission of the  
17 court of appeals before 'a second or successive habeas application  
18 under § 2254' may be commenced."). Because Petitioner has not  
19 obtained authorization from the Ninth Circuit Court of Appeals,  
20 this Court cannot entertain the present Petition. See Burton v.  
21 Stewart, supra.

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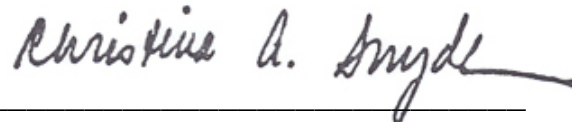
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ORDER

Accordingly, IT IS ORDERED that the Petition be dismissed without prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: August 13, 2018

A handwritten signature in dark ink, reading "Christina A. Snyder", with a horizontal line underneath.

CHRISTINA A. SNYDER  
UNITED STATES DISTRICT JUDGE